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SERVICE DATE – MARCH 31, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 733

EXPEDITING RATE CASES

Decided: March 30, 2017

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: Pursuant to Section 11 of the Surface Transportation Board Reauthorization Act of 2015 (STB Reauthorization Act), the Surface Transportation Board (Board) is proposing changes to its rules pertaining to its rate case procedures to help improve and expedite the rate review process.

DATES: Comments are due by May 15, 2017. Reply comments are due June 14, 2017.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the "E-FILING" link on the Board's website, at "<http://www.stb.gov>." Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 733, 395 E Street, S.W., Washington, DC 20423-0001. Copies of written comments and replies will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's website.

FOR FURTHER INFORMATION CONTACT: Sarah Fancher, (202) 245-0355. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: Section 11 of the STB Reauthorization Act, Pub. L. No. 114-110, 129 Stat. 2228 (2015) directs the Board to "initiate a proceeding to assess procedures that are available to parties in litigation before courts to expedite such litigation and the potential application of any such procedures to rate cases." In addition, Section 11 requires the Board to comply with a new timeline in Stand-Alone Cost (SAC) cases.

In advance of initiating this proceeding, Board staff held informal meetings with stakeholders<sup>1</sup> to explore and discuss ideas on: (1) how procedures to expedite court litigation could be applied to rate cases, and (2) additional ways to move SAC cases forward more expeditiously. The Board issued an Advance Notice of Proposed Rulemaking (ANPRM) on June 15, 2016, seeking formal comment on specific ideas raised in the informal meetings as well as comments on any other relevant matters.

The Board received comments on the ANPRM from the following organizations: the Rail Customer Coalition; Samuel J. Nasca on behalf of SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY); the Association of American Railroads (AAR); the Western Coal Traffic League, American Public Power Association, Edison Electric Institute, National Association of Regulatory Utility Commissioners, National Rural Electric Cooperative Association, and Freight Rail Customer Alliance (collectively, Coal Shippers/NARUC); CSX Transportation, Inc. (CSXT); the American Chemistry Council, the Dow Chemical Company, and M&G Polymers USA, LLC (Joint Carload Shippers); Norfolk Southern Railway Company (NSR); Union Pacific Railroad Company (UP); and Oliver Wyman.

Based on the comments, the Board is now proposing specific changes intended to help improve the rate review process and expedite rate cases.<sup>2</sup> In **Section I**, the Board addresses the comments and how they have formed the basis of the rules proposed here. In **Section II**, the Board explains the newly proposed rules. Note, these proposed rules are not intended to be a comprehensive response to the comments received in this docket, nor are they the final action the Board plans to take to improve the Board's rate review processes for all shippers. The Board will continue to evaluate the comments received and review its regulations generally, and may propose additional revisions at a later date.

## **I. Comments in Response to the ANPRM**

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<sup>1</sup> Board staff met with individuals either associated with and/or speaking on behalf of the following organizations: American Chemistry Council; Archer Daniels Midland Company; CSX Transportation, Inc.; Economists Incorporated; Dr. Gerald Faulhaber; FTI Consulting, Inc.; GKG Law, P.C.; Growth Energy; Highroad Consulting; L.E. Peabody; LaRoe, Winn, Moerman & Donovan; consultant Michael A. Nelson; Norfolk Southern Railway Company; Olin Corporation; POET Ethanol Products; Sidley Austin LLP; Slover & Loftus LLP; Steptoe & Johnson LLP; The Chlorine Institute; The Fertilizer Institute; The National Industrial Transportation League; and Thompson Hine LLP. We note that some participants expressed individual views, not on behalf of the organization(s) with which they are associated.

<sup>2</sup> Although many of the proposals pertain specifically to SAC cases—the Board's methodology for large rate cases—some of the proposals would also benefit cases filed under the Board's other methodologies. In those instances we specify that a particular proposal would also apply in, for example, Simplified-SAC or Three-Benchmark cases (collectively, simplified standards). See Simplified Standards for Rail Rate Cases, EP 646 (Sub-No. 1) (STB served Sept. 5, 2007).

*Pre-Complaint Period.* In the ANPRM, the Board noted that several stakeholders suggested that the Board could require a complainant, before filing its SAC complaint, to file a notice similar to that required in the context of major and significant mergers before the Board. See 49 C.F.R. § 1180.4(b). One of the purposes of the pre-complaint filing would be to provide the railroad with time to start preparing for litigation, including gathering documents and data necessary for the discovery stage, which in turn could benefit both parties by accelerating the discovery process. ANPRM, slip op. at 3. Accordingly, the Board sought comments on the merits of adopting a pre-filing requirement in SAC cases, and, if a pre-filing notice were adopted, the information that should be contained in that notice and the appropriate time period for filing the notice (e.g., 30 or 60 days prior to filing a complaint). The Board also sought comments on the idea of offering or requiring mediation during a pre-complaint period.

Several railroad and shipper interests generally support the requirement of a pre-filing notice. (CSXT Comments 7, AAR Comments 6, Joint Carload Shippers Comments 4-5.) CSXT and Joint Carload Shippers comment that the filing would provide early notice of impending discovery obligations. (CSXT Comments 7-10, Joint Carload Shippers Comments 4-5.) CSXT also comments that a pre-filing notice could allow the parties to agree on a protective order that could be in place at the outset of the case. (CSXT Comments 8.)

Conversely, NSR and Coal Shippers/NARUC comment that a pre-filing notice in and of itself likely would not do much to expedite rate cases. (NSR Comments 35, Coal Shippers/NARUC Comments 33.) NSR argues that, even with such a notice, the railroad can only begin to gather the necessary documents and data once the shipper has filed its case, indicating whether it is a SAC, Simplified-SAC, or Three-Benchmark case, and the shipper has served its discovery requests, informing the railroad of the time frame for discovery materials and identified the segments of the railroad for which discovery is sought. (NSR Comments 35.) Coal Shippers/NARUC comment that once a shipper has decided to file a SAC case, it is ready to do so immediately, and because of the negotiations between the shipper and rail carriers where a potential SAC case is in play, many rail carriers start gathering the necessary SAC information without any pre-filing requirement. (Coal Shippers/NARUC Comments 33-34.) Coal Shippers/NARUC comment that the only potential benefit of a pre-filing requirement is one that includes a response deadline—e.g., requiring a rail carrier to produce specified SAC information no later than 30 days after the complaint is filed. Coal Shippers/NARUC suggest that the Board consider a procedure where the pre-filing requirement is at the complainant shipper's option, and, if the shipper so elects, the respondent rail carrier is required to provide information at a specified date after the complaint is filed. (Coal Shippers/NARUC Comments 34.)

Regarding whether mediation should be conducted during a pre-complaint period, CSXT and Joint Carload Shippers comment that doing so would be beneficial in that it would allow parties to focus exclusively on litigation after the complaint has been filed. (CSXT Comments 9-10, Joint Carload Shippers Comments 4-5.) AAR comments that mediation at the outset of the process could allow the parties to avoid litigation altogether, though it would not actually expedite the rate case itself once it is filed. (AAR Comments 6.) Coal Shippers/NARUC

comment that no coal rate cases have settled because of the Board's mediation process, and that mandatory mediation has driven up the costs associated with pursuing relief from the Board. (Coal Shippers/NARUC Comments 40.) Coal Shippers/NARUC suggest eliminating mandatory mediation of SAC disputes entirely, though leaving the option open for the parties if they jointly agree to engage in mediation at any time during the SAC case process. (Coal Shippers/NARUC Comments 40.)

With respect to the timing of the pre-filing notice, both CSXT and Joint Carload Shippers argue that 60 days prior to the filing of a SAC complaint probably would be optimal, and Joint Carload Shippers assert that this would afford sufficient time for scheduling and conducting mediation. (CSXT Comments 10, Joint Carload Shippers Comments 5.) Although Coal Shippers/NARUC oppose the requirement of a pre-filing notice, they argue that, if one is mandated by the Board, it should be filed no later than 30 days prior to the date the complaint is filed. (Coal Shippers/NARUC Comments 38-39.)

Concerning the content of the pre-filing notice, parties suggest that the pre-filing notice could include: (1) the rate that will be challenged; (2) the origin-destination pair(s) being challenged; (3) the commodities at issue; (4) the states the shipper expects its SARR may traverse; and (5) other pertinent information. (See CSXT Comments 11, Joint Carload Shippers Comments 5, AAR Comments 6; Coal Shippers/NARUC Comments 38-39<sup>3</sup>.)

The Board is persuaded that establishing a pre-complaint period, during which parties engage in mediation without the burden of simultaneous litigation and discovery, outweighs any burden the pre-complaint period may add. The Board believes that such a requirement would help the case proceed more efficiently and quickly once the complaint is filed because the pre-filing notice would put the parties on notice as to what they likely will need to produce in discovery. When the Board first codified mandatory mediation in SAC cases in Procedures to Expedite Resolution of Rail Rate Challenges to be Considered Under the Stand-Alone Cost Methodology, EP 638, slip op. at 2-3, 13-14 (STB served Apr. 3, 2003), the Board believed that the most appropriate time to mediate was after the complaint was filed. Now, with the benefit of more than a decade of experience with mediation, the Board is convinced that pre-complaint mediation would be more beneficial to SAC litigants.<sup>4</sup>

With respect to the timing of the pre-filing notice, the Board believes that a longer period of 70 days is appropriate to accommodate the full schedule of mediation so that parties will have the time to focus on resolutions before litigation begins. The Board welcomes comment on this proposed longer period. With respect to the contents of the notice, the Board believes that the most useful elements are: (1) the rate to be challenged; (2) the origin/destination pair(s) to be challenged; and (3) the commodities at issue. The Board also sees the benefit of having a

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<sup>3</sup> Again, Coal Shippers/NARUC oppose the requirement of a pre-filing notice, but offer suggestions in the event that the Board were to require a pre-filing notice.

<sup>4</sup> The existence of the pre-filing requirement would not affect the statutory requirement that a complaint must be filed within two years after the claim accrues.

protective order in place as early as possible, and thus requiring the shipper to include with its pre-filing notice a motion for protective order. Accordingly, as discussed in **Section II**, the Board proposes to require a complainant to submit a pre-filing notice and motion for protective order 70 days before filing a SAC complaint.

The Board recognizes Coal Shippers/NARUC's concerns that, once shippers have considered filing a SAC case, they may wish to litigate immediately, but the Board believes that the benefits of engaging in early mediation, establishing a protective order, and providing early notice of impending discovery obligations outweigh that delay. The Board does not agree with the Coal Shippers/NARUC's suggestion that the Board eliminate mandatory mediation of SAC disputes altogether, given the potential benefit of mediation in SAC cases. Contrary to Coal Shippers/NARUC's claim, mandatory mediation did result in a settlement in a rate case involving coal. See NRG Power Marketing LLC v. CSX Transp., Inc., NOR 42122, slip op. at 1 (STB served July 8, 2010.)

Discovery. The Board also sought comment on several ways in which the Board could change its discovery procedures to help improve and expedite rate cases.

a. Service of initial discovery requests. The Board sought comment on requiring parties to either serve standard discovery requests or disclosures of information with the filing of their complaints and answers, as is done in some federal courts. ANPRM, slip op. at 3-4. NSR strongly supports the concept of standardizing initial discovery requests for both the complainant and the defendant and further supports the concept of requiring these initial discovery requests to be served concurrently with the complaint or answer, as applicable. (NSR Comments 36.) Joint Carload Shippers also support standardized disclosures, although they state that there is not much merit to standardized discovery requests, as the time savings is not in the standardization of discovery requests, but in requiring automatic and earlier production of responsive information. (Joint Carload Shippers Comments 6-7.) Joint Carload Shippers focus on the potential time savings from the standardization of traffic and revenue data. (Joint Carload Shippers Comments 7-9.)

CSXT does not take a position on standardizing discovery requests, but cautions that discovery requests, while relatively consistent from case to case, evolve over time. (CSXT Comments 23-24.) Coal Shippers/NARUC do not support standardized discovery requests, and comment that SAC discovery questions have evolved over time, and should continue to do so to meet shippers' discovery needs and to address the technological changes in how rail carriers collect, store, and maintain data. (Coal Shippers/NARUC Comments 43.) Coal Shippers/NARUC also do not support the use of standardized disclosures. (Coal Shippers/NARUC Comments 43.) They note that while the specific categories of information that shippers need—what they term “Core SAC Data”—generally remains the same from case to case, the exact set of responsive information coal shippers need can change over time based on case-specific needs and changes in how rail carriers maintain and update their internal databases. (Coal Shippers/NARUC 43.) Thus, instead of standardized disclosures, Coal Shippers/NARUC suggest the following process: (1) require the complainant shipper to file its initial discovery

requests along with its complaint; (2) require Board staff to hold a technical discovery conference with the parties no later than 15 days after the initial discovery requests are filed, at which the complainant shipper will identify those questions seeking Core SAC Data, and discuss logistical issues about producing this data; and (3) require that, following the conference, the Board issue an order directing the defendant rail carrier to respond to the complainant shipper's specific requests seeking Core SAC Data no later than 60 days after the initial discovery requests were filed. (Coal Shippers/NARUC Comments 45.) Coal Shippers/NARUC further suggest that the Board should require submission of discovery by rail carriers no later than 20 days after the shipper's complaint is filed. Coal Shippers/NARUC also propose that the Board allow rail carrier requests for staff conferences regarding discovery requests at any time after 40 days have elapsed since filing of a complaint. (Coal Shippers/NARUC Comments 47.)

The Board is persuaded that the value of allowing discovery requests and information disclosed in SAC cases to evolve outweighs the potential time saved by standardizing discovery requests or standardized disclosures. Accordingly, the Board will not propose to change the SAC case regulations in this manner. However, the Board agrees with the general consensus among commenters that beginning discovery as soon as possible will help expedite SAC cases. Therefore, the Board proposes requiring a complainant to certify that it has served its initial discovery requests with its complaint and requiring a defendant to certify that it has served its initial discovery requests with its answer.

We do not see the need to adopt Coal Shippers/NARUC's proposed process involving a technical conference at which the shipper would identify the discovery requests seeking Core SAC Data in discovery served with the complaint at this time. The Board believes this should be evident from the discovery itself. However, as discussed further below, the Board encourages additional use of conferences between the parties and Board staff to promptly resolve any disputes that arise and parties could request a conference early in the discovery process if necessary in a particular case.

b. Meet and confer requirement. The Board sought comment on the merits of a requirement, similar to Federal Rule of Civil Procedure 37, that any party filing a motion to compel certify that it has attempted to confer with the opposing party first. ANPRM, slip op. at 5.

Railroad and shipper interests generally support such a meet and confer requirement. (CSXT Comments 28-29, Coal Shippers/NARUC Comments 51, NSR Comments 41-42, Joint Carload Shippers Comments 16.) Coal Shippers/NARUC suggest that any such rule also address what they claim is continuing confusion over the Board's procedural rule that requires the filing of motions to compel in certain instances no later than 10 days after an insufficient response is received. See 49 C.F.R. § 1114.31(a). Specifically, Coal Shippers/NARUC also suggest that the Board confirm that the 10-day rule does not apply to requests for document production. (Coal Shippers/NARUC Comments 51-52.) In addition, Coal Shippers/NARUC suggest that the 10-day rule be changed to 14 days for other covered discovery to allow a moving party sufficient time to adhere to any new "confer first" rule. (Coal Shippers/NARUC Comments 51-52.) Joint

Carload Shippers comment that there must be an exception for situations where consultation is not practical due to time constraints. (Joint Carload Shippers Comments 16.) NSR suggests that, rather than imposing a meet-and-confer requirement, the Board should require Board staff to “convene a conference with the parties to discuss” a motion to compel, rather than making it optional, as is currently done in the existing regulations. (NSR Comments 41-42.)<sup>5</sup>

The Board agrees with the majority of comments that adding a meet-and-confer requirement would help to reduce the number of disputes that reach the Board and thus expedite rate cases. The Board acknowledges Joint Carload Shippers’ concern that there are situations where consultation may be difficult due to time constraints, but does not believe that the best way of handling those instances is to create an exception to the rule. Instead, the Board proposes a requirement modeled on Federal Rule of Civil Procedure 37, which requires that the movant certify that it has in good faith met and conferred or attempted to meet and confer with the person or party failing to answer discovery to resolve the issue without Board intervention.

The Board is not convinced that it needs to extend its 10-day rule if it adopts a meet-and-confer requirement. The Board believes that 10 days is sufficient time to confer or attempt to confer with an unresponsive party, and extending that period any further would unnecessarily delay discovery.<sup>6</sup> Additionally, the Board does not agree with NSR that there is a need to modify 49 C.F.R. § 1114.31(a)(3) to make a staff conference mandatory. Certain disputes may be resolved more efficiently by a decision issued by the Director of the Office of Proceedings under 49 C.F.R. § 1114.31(a)(4) without the need for a staff conference. However, the Board will continue to convene staff conferences when appropriate, and encourages any party that believes such a conference would aid in resolving a dispute to request the Board convene a staff conference at any point in the proceeding.

*Evidentiary Submissions.* The Board also sought comment on whether it should consider staggering the filing of public and highly confidential versions of the parties’ pleadings to give parties more time to ensure that public versions of filings are appropriately redacted without delaying the case. ANPRM, slip op. at 7. Additionally, the Board suggested that it could limit

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<sup>5</sup> NSR also suggests that the Board codify that “a party seeking to compel discovery must show (1) that it needs the information to make its case, (2) that the information cannot be readily obtained through other means, and (3) that the request is not unduly burdensome.” (NSR Comments 30 (citing Procedures to Expedite, EP 638, slip op. at 4 (STB served Apr. 3, 2003).) The Board does not believe that its current standard for ruling on motions to compel is flawed or that NSR’s proposal would expedite the decision-making process.

<sup>6</sup> In addition, Coal Shippers/NARUC suggest that the Board confirm that the 10-day rule in 49 C.F.R. § 1114.31(a) does not apply to requests for document production. However, because this is a change to the regulations that would impact more than just rate reasonableness cases, the Board does not believe that it is appropriate to address Coal Shippers/NARUC’s concern in this proceeding, which is limited specifically to procedures in rate cases. In any event, although Coal Shippers/NARUC claim that this regulation has created confusion in rate cases, it does not cite any examples.

final briefs to certain subjects on which the Board would like further argument rather than allowing generalized argument. ANPRM, slip op. at 6.

a. Staggered filings and confidential designations. Several comments from railroad and shipper interests support the idea of staggering public and highly confidential versions of the parties' pleadings. (CSXT Comments 39, Coal Shippers/NARUC Comments 61, NSR Comments 48, Joint Carload Shippers Comments 26.) Coal Shippers/NARUC propose three business days for the staggering of the filings. (Coal Shippers/NARUC Comments 61.) CSXT cautions, however, that the delay in filing the public versions would delay the ability of in-house personnel to begin analyzing the filings and suggests that parties identify the information in filings that can be shared with in-house personnel simultaneously with highly confidential submissions. (CSXT Comments 39.) CSXT argues that any delay in providing evidence to parties' in-house experts and personnel may require extending a case's procedural schedule. (CSXT Comments 40.) NSR notes that this proposal likely would do more to ensure proper redactions than to expedite rate cases. (NSR Comments 48.)

CSXT also recommends that the Board create a standard rule for identifying highly confidential and confidential materials in parties' pleadings. (CSXT Comments 40.) CSXT asserts that it and other parties have used the convention of double braces for highly confidential material (e.g., {{highly confidential}}) and single braces for confidential material (e.g., {confidential}), but others have designated material in a more haphazard way, which makes it difficult to identify materials that can be shared with in-house personnel. (CSXT Comments 40.)

The Board acknowledges CSXT's concern that delaying the submission of public filings delays the ability of in-house personnel to review and respond to the filings. However, the Board believes the appropriate remedy is to set a delay of three business days, as suggested by Coal Shippers/NARUC, rather than have parties identify the information in filings that can be shared with in-house personnel simultaneously with the highly confidential submission. The Board believes that the evolution of rate case practice makes this change appropriate now, even though the Board rejected such a proposal in Procedures to Expedite, EP 638 (STB served June 6, 2003), reconsideration denied (STB served July 31, 2003). When the Board held in Procedures to Expedite that parties must file a public version of their submissions simultaneously with any highly confidential or confidential version they might also choose to file, the Board suggested that parties "should propose procedural schedules that allow the time they will need to comply with the redaction requirements by the due dates for their filings with the Board." Procedures to Expedite, EP 638, slip op. at 5. Over a decade of rate case experience has demonstrated that this is not a practicable solution, and the Board is persuaded that staggered filings are appropriate. Therefore, as discussed below, the Board proposes allowing parties to submit public versions of their filings three business days after the submission of the highly confidential versions in all rate case proceedings.

The Board also agrees with CSXT's comment that standardizing the identification of public, confidential, and highly confidential material will reduce confusion. Therefore, in **Section II**, the Board proposes creating standard identifying markers that would be applied in all



rate case proceedings. The Board also proposes standard markers for sensitive security information.<sup>7</sup>

b. Limits on final briefs. Coal Shippers/NARUC comment that, generally, limiting final briefs to specific issues of concern to the Board is a good way to make the briefs more useful to the Board and perhaps reduce the costs that the parties otherwise would incur in presenting a brief that addresses a much wider swath of case issues. (Coal Shippers/NARUC Comments 60-61.) Joint Carload Shippers support limiting the final briefs to specific subjects identified by the Board based upon its review of the evidence, or, as an alternative, staggering the briefing schedule, to allow the complainant, which has the burden of proof, the opportunity to respond to the defendant's surrebuttal arguments. (Joint Carload Shippers Comments 25.) NSR comments that while final briefs could be limited to subjects on which the Board would like further information, the Board would benefit from building in some flexibility for the parties to highlight issues they believe are important. (NSR Comments 47.)

The Board believes that selection of the topics for final briefs could be beneficial, however, it would require a Board decision following the close of evidence. The Board is concerned that this additional step would curtail the already shortened period available to the Board for issuing a decision on the merits in SAC cases. More importantly, the Board believes that the better approach for encouraging parties to focus on the most important issues in SAC and Simplified-SAC cases is to limit the length of final briefs. The Board has on occasion, in individual cases, imposed page limits on final briefs. See, e.g., Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 1 (STB served June 3, 2016); Total Petrochems. & Ref. USA, Inc. v. CSX Transp., Inc., NOR 42121, slip op. at 4 (STB served Sept. 26, 2013). Based on the Board's prior experience, the Board proposes to limit final briefs to 30 pages, inclusive of exhibits, in all SAC and Simplified-SAC cases. The Board believes that this is sufficient space for the parties to articulate their final concerns, but limited enough to prevent further argument on all issues and surrebuttal.

Interaction with Board Staff. The Board sought comment on the increased use of written questions and technical conferences in SAC cases, starting with an early technical conference to establish ground rules and issue-specific Board expectations. ANPRM, slip op. at 7. The Board also suggested that it could provide advance notice of the topics to be discussed in a technical conference to promote an efficient and productive conference. ANPRM, slip op. at 7. Finally, the Board suggested that it could appoint a liaison to the parties to answer questions about the process and to intervene informally (e.g., hold status conferences) if it would help discovery or other matters move more smoothly. ANPRM, slip op. at 7.

Several railroads and shipper interests supported the idea of increased staff involvement. (AAR Comments 8; CSXT Comments 40-41; NSR Comments 12; Joint Carload Shippers Comments 26-28.) Coal Shippers/NARUC agree that increased staff involvement, as outlined by

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<sup>7</sup> Protective orders in SAC cases generally distinguish between "confidential," "highly confidential," and "sensitive security information."

the Board in the ANPRM, would be very useful to the parties and should help advance the submission, and decision, of rate cases in an expeditious manner. (Coal Shippers/NARUC Comments 62.) Joint Carload Shippers argue that greater interaction through technical conferences and written interrogatories could have several benefits associated with many of the other subjects in the ANPRM.<sup>8</sup> CSXT supports the idea of a liaison to the parties as a way to resolve disputes short of formal motions to compel. (CSXT Comments 40-41.)

The Board is convinced that increased staff involvement at all stages of a rate case, both through technical conferences/written questions and a Board-appointed liaison to the parties, would reduce the number of disputes between the parties and thus expedite the rate case process.<sup>9</sup> Thus, the Board proposes to appoint a liaison to the parties within 10 business days of the submission of the pre-filing notice in SAC cases, and within 10 business days of the filing of the complaint in Simplified-SAC and Three-Benchmark cases. The liaison would not be recused from handling substantive elements of the case. In addition, the Board intends to make greater use of written questions from staff and technical conferences with the parties at every stage of the case. When a technical conference is requested by a party or parties or convened by the Board, the Board intends to provide advance notice of the topics to be discussed to promote an efficient and productive conference. The Board believes that increased communication between the parties and the Board would expedite rate cases by reducing the number of disputes between the parties and thus the number of issues that must be decided by the Board.

## **II. The Proposed Rules.**

The proposed rules contain changes to the Board's regulations at 49 C.F.R. parts 1104, 1109, 1111, 1114, and 1130, which are set out in Appendix A. In proposing these changes, the Board has considered the suggestions from commenters on the ANPRM, incorporated those suggestions where appropriate, and modified them where necessary to propose changes to the regulations that the Board believes would best help to improve and expedite the rate case process.

*Pre-Complaint Period.* The proposed rules include changes creating and detailing a pre-complaint period in SAC cases intended to provide parties with an opportunity to mediate the dispute and prepare for litigation.

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<sup>8</sup> For example, Joint Carload Shippers note that a pre-trial conference with Board staff would serve many of the same functions of Federal Rule of Civil Procedure 16, and it supports greater use of technical conferences during Board review of the parties' evidence. (Joint Carload Shippers Comments 26-28.)

<sup>9</sup> In the ANPRM, the Board sought comment on the increased use of written questions and technical conferences in SAC cases in particular; however, the Board believes that increased staff involvement would help to improve and expedite rate cases under other methodologies as well.

1. Pre-filing Notice. First, the Board proposes to create a pre-complaint period at newly redesignated 49 C.F.R. § 1111.1 by requiring a SAC complainant to submit a pre-filing notice at least 70 days prior to filing its complaint. The Board proposes that the pre-filing notice contain the rate and origin/destination pair(s) to be challenged, the commodities at issue, and a motion for protective order pursuant to 49 C.F.R. § 1104.14(c). This requirement would accomplish several goals. It would put the defendant on notice of the impending complaint such that it can begin to prepare for discovery and litigation. In addition, the early submission of a motion for protective order would allow a protective order to be in place at the outset of a case, thus expediting discovery production and disclosures. Finally, it would allow the parties to engage in mediation pre-complaint, as described below.
2. Mandatory Mediation. Second, the Board proposes to revise 49 C.F.R. § 1109.4 to move mandatory mediation in SAC cases to the pre-complaint period. This change to the regulations would not impose new requirements, but would require mediation to take place earlier to allow parties to focus on the mediation process without the distractions of litigation. The Board intends for mediation to be complete prior to the filing of the complaint; however, consistent with current procedures, the rules will allow for an extension of time via Board order.
3. Appointment of a Board Liaison to the Parties. Third, under 49 C.F.R. § 1111.1, the Board proposes in SAC cases to appoint a liaison to the parties within 10 business days of the complainant's submission of the pre-filing notice. The Board proposes to amend the newly redesignated 49 C.F.R. § 1111.10(a) to appoint a liaison within 10 business days of the filing of the complaint in cases using simplified standards. With this addition to the regulations, the Board intends to improve communication between the parties and the Board by providing the parties with a point of contact to whom they can address questions or disputes.

Discovery. The proposed rules include changes to the Board's discovery regulations intended to streamline discovery in rate cases.

1. Initial Discovery Requests. First, the Board proposes to add 49 C.F.R. § 1111.2(f) and amend 49 C.F.R. § 1114.21(d) & (f) to require a complainant in a SAC proceeding to certify that it has served its initial discovery requests simultaneously with its complaint. The Board also proposes to add 49 C.F.R. § 1111.5(f) and amend 49 C.F.R. § 1114.21(d) & (f) to require a defendant in a SAC proceeding to certify that it has served its initial discovery requests simultaneously with its answer. To address the filing of an amended or supplemental complaint, the Board proposes to amend the newly redesignated 49 C.F.R. § 1111.3(b) to require the complainant to certify that it has served on the defendant any initial discovery requests affected by the amended or supplemental complaint, if any. The Board proposes a corresponding requirement at 49 C.F.R. § 1111.5(f), in which a defendant responding to an amended or supplemental complaint must certify that it has served on the complainant any

discovery requests affected by the amended or supplemental complaint, if any. With these changes, the Board intends to expedite discovery, and thus the rate case, by beginning discovery with the complaint. These changes would eliminate the current potential gap between the filing of the complaint and the beginning of discovery.

2. Meet and Confer Requirement. Second, the Board proposes to amend 49 C.F.R. § 1114.31(a) to include a certification that the party filing a motion to compel has in good faith conferred or attempted to confer with the party serving discovery to settle the dispute over those terms without Board intervention. The requirement would apply in SAC cases and cases filed under simplified standards. The Board believes that this requirement will encourage parties to resolve disputes without involving the Board, thereby expediting litigation of a rate case by reducing the number of necessary Board decisions.

Evidentiary Submissions. The proposed rules include changes to the Board's evidentiary regulations intended to improve and expedite the presentation of evidence in rate cases.

1. Stagger the Submission of Public and Highly Confidential Versions of Filings. First, in both SAC and simplified standards cases, the Board proposes to allow parties to submit highly confidential versions of the filings according to the procedural schedule in a particular case, and submit public versions of those filings within three business days after the filing of the highly confidential versions. With this change the Board intends to allow parties a reasonable amount of time to ensure confidentiality after submitting the highly confidential version of each filing.<sup>10</sup>
2. Standard Convention for Identifying Confidential, Highly Confidential, and Sensitive Security Information. Second, the Board proposes to revise 49 C.F.R. § 1104.14 to create standard identifying markers set forth in protective orders for the submission of confidential, highly confidential, and sensitive security information in rate cases. The Board proposes that all confidential information be contained in single braces, i.e., {X}, all highly confidential information be contained in double braces, i.e., {{Y}}, and all sensitive security information to be contained in triple braces, i.e., {{{Z}}}. This change would eliminate any confusion caused by parties using different methods of identification and would apply in both SAC and simplified standards cases.
3. Limits on Final Briefs. Third, the Board proposes to limit the length of final briefs to 30 pages, inclusive of exhibits. With this change the Board intends to have the parties focus on the most important issues, and eliminate additional time otherwise

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<sup>10</sup> In the Board's experience, parties to rate cases typically do not submit confidential versions of their filings in addition to the highly confidential and public versions. It is the Board's understanding that parties would continue to do so, and properly identify all confidential, highly confidential, and sensitive security information in the first filing according to the convention described below.

used by the Board selecting certain issues or issuing decisions to limit the length of final briefs.

*Technical Modifications.* In addition, the Board proposes two modifications in the existing regulations. Specifically, the Board proposes to amend the newly redesignated 49 C.F.R. § 1111.11(b) to apply the requirement that the parties confer to SAC complaints in addition to simplified standards complaints. The Board also proposes to amend 49 C.F.R. § 1130.1 to include the correct reference to the newly redesignated 49 C.F.R. § 1111.2(a).

The Board seeks comments from all interested persons on these proposed rules. Importantly, the Board encourages interested persons to propose and discuss potential modifications or alternatives to the proposed rule. The Board will consider all recommended proposals in an effort to establish the most useful changes to improve and expedite the rate review process.

*Regulatory Flexibility Act.* The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. §§ 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. §§ 601-604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, § 603(a), or certify that the proposed rule would not have a "significant impact on a substantial number of small entities." § 605(b). The impact must be a direct impact on small entities "whose conduct is circumscribed or mandated" by the proposed rule. White Eagle Coop. v. Conner, 553 F.3d 467, 480 (7th Cir. 2009).

The Board's proposed changes to its regulations here are intended to improve and expedite its rate case procedures and do not mandate or circumscribe the conduct of small entities. Effective June 30, 2016, for the purpose of RFA analysis for rail carriers subject to our jurisdiction, the Board defines a "small business" as only including those rail carriers classified as Class III rail carriers under 49 C.F.R. § 1201.1-1. See Small Entity Size Standards Under the Regulatory Flexibility Act, EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting).<sup>11</sup> The changes proposed here are largely procedural or codify existing practice, and would not have a significant economic impact on small entities. Furthermore, since the inception of the Board in 1996, only three of the 51 cases filed challenging the reasonableness of freight rail rates have involved a Class III rail carrier as a defendant. Those three cases involved a total

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<sup>11</sup> Class III carriers have annual operating revenues of \$20 million or less in 1991 dollars, or \$36,633,120 or less when adjusted for inflation using 2015 data. Class II rail carriers have annual operating revenues of less than \$250 million but in excess of \$20 million in 1991 dollars, or \$457,913,998 and \$36,633,120 respectively, when adjusted for inflation using 2015 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds on its website. 49 C.F.R. § 1201.1-1.

of 13 Class III rail carriers. The Board estimates that there are approximately 656 Class III rail carriers. Therefore, the Board certifies under 5 U.S.C. § 605(b) that these proposed rules, if promulgated, would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. The proposed rules, if promulgated, would amend the existing procedures for filing and litigating a rate case, as directed by Section 11 of the STB Reauthorization Act.

Paperwork Reduction Act. Pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3549, and Office of Management and Budget (OMB) regulations at 5 C.F.R. § 1320.8(d)(3), the Board seeks comments about each of the proposed collections regarding: (1) whether the collection of information, as modified in the proposed rule and further described in Appendix A, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. The Board estimates these new requirements would add a total annual hour burden of eight hours and no total annual "non-hour burden" cost under the PRA. Information pertinent to these issues is included in Appendix B. This proposed rule will be submitted to OMB for review as required under 44 U.S.C. § 3507(d) and 5 C.F.R. § 1320.11. Comments received by the Board regarding the information collection will also be forwarded to OMB for its review when the final rule is published.

#### List of Subjects

##### 49 C.F.R. Part 1104

Administrative practice and procedure.

##### 49 C.F.R. Part 1109

Administrative practice and procedure, Maritime carriers, Motor carriers, Railroads.

##### 49 C.F.R. Part 1111

Administrative practice and procedure, Investigations.

##### 49 C.F.R. Part 1114

Administrative practice and procedure.

##### 49 C.F.R. Part 1130

Administrative practice and procedure.

It is ordered:

1. Comments are due by May 15, 2017. Reply comments are due by June 14, 2017.
2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.
3. Notice of this decision will be published in the Federal Register.
4. This decision is effective on its service date.

By the Board, Board Members Begeman, Elliott, and Miller.

## Appendix A

### Code of Federal Regulations

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend title 49, chapter X, parts 1104, 1109, 1111, 1114, and 1130 of the Code of Federal Regulations as follows:

#### **PART 1104—FILING WITH THE BOARD-COPIES-VERIFICATION-SERVICE- PLEADINGS, GENERALLY**

1. The authority citation for part 1104 is revised to read as follows: 5 U.S.C. 553 and 559; 18 U.S.C. 1621; and 49 U.S.C. 1321.
2. In § 1104.14, add paragraph (c) to read as follows:

##### **§ 1104.14 Protective orders to maintain confidentiality.**

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(c) *Requests for protective orders in stand-alone cost and simplified standards cases.* A motion for protective order in stand-alone cost and simplified standards cases shall specify that evidentiary submissions will designate confidential material within single braces (i.e., {X}), highly confidential material within double braces (i.e., {{Y}}), and sensitive security information within triple braces (i.e., {{{Z}}}). In stand-alone cost cases, the motion for protective order shall be filed together with the notice pursuant to 49 C.F.R. § 1111.1.

#### **PART 1109—USE OF MEDIATION IN BOARD PROCEEDINGS**

3. The authority citation for part 1109 is revised to read as follows: 49 U.S.C. 1321(a) and 5 U.S.C. 571 et seq.
4. In § 1109.4, revise paragraphs (a), (b), and (g) to read as follows:

##### **§ 1109.4 Mandatory mediation in rate cases to be considered under the stand-alone cost methodology.**

(a) *Mandatory use of mediation.* A shipper seeking rate relief from a railroad or railroads in a case involving the stand-alone cost methodology must engage in non-binding mediation of its dispute with the railroad upon submitting a pre-filing notice under 49 C.F.R. part 1111.

(b) *Assignment of mediators.* Within 10 business days after the shipper submits its pre-filing notice, the Board will assign one or more mediators to the case. Within 5 business days of the assignment to mediate, the mediator(s) shall contact the parties to discuss ground rules and the time and location of any meeting.

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(g) *Procedural schedule.* Absent a specific order from the Board granting an extension, the mediation will not affect the procedural schedule in stand-alone cost rate cases set forth at 49 C.F.R. § 1111.9(a).

#### **PART 1111—COMPLAINT AND INVESTIGATION PROCEDURES**



5. The authority citation for part 1111 continues to read as follows: 49 U.S.C. 10704, 11701, and 1321.

6. Amend part 1111 as follows:

- a. Redesignate § 1111.1 as 1111.2.
- b. Redesignate § 1111.2 as 1111.3.
- c. Redesignate § 1111.3 as 1111.4.
- d. Redesignate § 1111.4 as 1111.5.
- e. Redesignate § 1111.5 as 1111.6.
- f. Redesignate § 1111.6 as 1111.7.
- g. Redesignate § 1111.7 as 1111.8.
- h. Redesignate § 1111.8 as 1111.9.
- i. Redesignate the newly redesignated paragraph 1111.9(b) to 1111.9(c).
- j. Revise newly redesignated paragraph 1111.9(a).
- k. Add new paragraph 1111.9(b).
- l. Redesignate § 1111.9 as 1111.10.
- m. Redesignate the newly redesignated paragraph 1111.10(b) to 1111.10(c).
- n. Redesignate the newly redesignated paragraph 1111.10(c) to 1111.10(d).
- o. Redesignate the newly redesignated paragraph 1111.10(d) to 1111.10(e).
- p. Add new paragraph 1111.10(b).
- q. Redesignate § 1111.10 as 1111.11.
- r. Add new section 1111.1.
- s. Add paragraph (f) to newly redesignated 1111.2.
- t. Revise newly redesignated § 1111.3.
- u. Add paragraph (f) to newly redesignated 1111.5.
- v. Revise newly redesignated § 1111.10(a).
- w. Revise newly redesignated § 1111.11(b).

The revisions read as follows:

**§ 1111.1 Pre-filing procedures in stand-alone cost cases.**

(a) *General.* At least 70 days prior to the proposed filing of a complaint challenging the reasonableness of a rail rate to be examined under constrained market pricing, complainant shall file a notice with the Board. The notice shall:

- (i) Identify the rate to be challenged;
- (ii) Identify the origin/destination pair(s) to be challenged;
- (iii) Identify the affected commodities; and
- (iv) Include a motion for protective order as set forth at 49 C.F.R. § 1104.14(c).

(b) *Liaison.* Within 10 days of the filing of the pre-filing notice, the Board shall appoint a liaison to the parties.

**§ 1111.2 Content of formal complaints; joinder.**

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(f) *Discovery in stand-alone cost cases.* Upon filing its complaint, the complainant shall certify that it has served its initial discovery requests on the defendant.

**§ 1111.3 Amended and supplemental complaints.**

(a) *Generally.* An amended or supplemental complaint may be tendered for filing by a complainant against a defendant or defendants named in the original complaint, stating a cause of action alleged to have accrued within the statutory period immediately preceding the date of such tender, in favor of complainant and against the defendant or defendants. The time limits for responding to an amended or supplemental complaint are computed pursuant to §§ 1111.5 and 1111.6 of this part, as if the amended or supplemental complaint was an original complaint.

(b) *Stand-alone cost.* If a complainant tenders an amended or supplemental complaint in a stand-alone cost case, the complainant shall certify that it has served on the defendant those initial discovery requests affected by the amended or supplemental complaint, if any.

(c) *Simplified standards.* A complaint filed under the simplified standards may be amended once before the filing of opening evidence to opt for a different rate reasonableness methodology, among Three-Benchmark, Simplified-SAC, or Full-SAC. If so amended, the procedural schedule begins again under the new methodology as set forth at §§ 1111.9 and 1111.10. However, only one mediation period per complaint shall be required.

**§ 1111.5 Answers and cross complaints.**

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(f) *Discovery in stand-alone cost cases.* Upon filing its answer, the defendant shall certify that it has served its initial discovery requests on the complainant. If the complainant tenders an amended or supplemental complaint to which the defendant must reply, upon filing the answer to the amended or supplemental complaint, the defendant shall certify that it has served on the complainant those initial discovery requests affected by the amended or supplemental complaint, if any.

**§ 1111.9 Procedural schedule in stand-alone cost cases.**

(a) *Procedural schedule.* Absent a specific order by the Board, the following general procedural schedule will apply in stand-alone cost cases after the pre-complaint period initiated by the pre-filing notice:

Day 0—Complaint filed, discovery period begins.

Day 7 or before—Conference of the parties convened pursuant to § 1111.11(b).

Day 20—Defendant's answer to complaint due.

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(b) *Staggered filings; final briefs.* (1) The parties may submit highly confidential versions of filings on the dates identified in the procedural schedule, and submit public versions of those filings within three business days thereafter.

(2) Final briefs are limited to 30 pages, inclusive of exhibits.

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**§ 1111.10 Procedural schedule in cases using simplified standards.**

(a) \*\*\*

(1) In cases relying upon the Simplified-SAC methodology:

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In addition, the Board will appoint a liaison within 10 business days of the filing of the complaint.

(2) In cases relying upon the Three-Benchmark methodology:

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In addition, the Board will appoint a liaison within 10 business days of the filing of the complaint.

(b) *Staggered filings; final briefs.* (1) The parties may submit highly confidential versions of filings on the dates identified in the procedural schedule, and submit public versions of those filings within three business days thereafter.

(2) In cases relying upon the Simplified-SAC methodology, final briefs are limited to 30 pages, inclusive of exhibits.

**§ 1111.11 Meeting to discuss procedural matters.**

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(b) *Stand-alone cost or simplified standards complaints.* In complaints challenging the reasonableness of a rail rate based on stand-alone cost or the simplified standards, the parties shall meet, or discuss by telephone or through email, discovery and procedural matters within 7 days after the complaint is filed in stand-alone cost cases, and 7 days after the mediation period ends in simplified standards cases. The parties should inform the Board as soon as possible thereafter whether there are unresolved disputes that require Board intervention and, if so, the nature of such disputes.

**PART 1114—EVIDENCE; DISCOVERY**

7. The authority citation for part 1114 is revised to read as follows: 5 U.S.C. 559; 49 U.S.C. 1321.

8. Amend § 1114.21 as follows:

a. Revise paragraph (d).

b. Revise the first sentence of paragraph (f).

The revisions read as follows:

**§ 1114.21 Applicability; general provisions.**

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(d) *Sequence and timing of discovery.* Unless the Board upon motion, and subject to the requirements at 49 C.F.R. §§ 1111.2(f) and 1111.5(f) in stand-alone cost cases, for the convenience of parties and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, should not operate to delay any party's discovery.

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(f) *Service of discovery materials.* Unless otherwise ordered by the Board, and subject to the requirements at 49 C.F.R. §§ 1111.2(f) and 1111.5(f) in stand-alone cost cases, depositions, interrogatories, requests for documents, requests for admissions, and answers and responses thereto, shall be served on other counsel and parties, but shall not be filed with the Board. \*\*\*

9. In § 1114.31(a) revise paragraph (a) introductory text to read as follows:

**§ 1114.31 Failure to respond to discovery.**

(a) *Failure to answer.* If a deponent fails to answer or gives an evasive answer or incomplete answer to a question propounded under § 1114.24(a), or a party fails to answer or gives evasive or incomplete answers to written interrogatories served pursuant to § 1114.26(a), the party seeking discovery may apply for an order compelling an answer by motion filed with the Board and served on all parties and deponents. Such motion to compel an answer must be filed with the Board and served on all parties and deponents. In stand-alone cost and simplified standards cases, such motion to compel an answer must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to answer discovery to obtain it without Board intervention. Such motion to compel an answer must be filed with the Board within 10 days after the failure to obtain a responsive answer upon deposition, or within 10 days after expiration of the period allowed for submission of answers to interrogatories. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

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**PART 1130—INFORMAL COMPLAINTS**

10. The authority citation for Part 1130 is revised to read as follows: 49 U.S.C. 1321, 13301(f), 14709.

11. In § 1130.1, revise paragraph (a) to read as follows:

**§ 1130.1 When no damages sought.**

(a) *Form and content; copies.* Informal complaint may be by letter or other writing and will be serially numbered and filed. The complaint must contain the essential elements of a formal complaint as specified at 49 C.F.R. § 1111.2 and may embrace supporting papers. The original and one copy must be filed with the Board.

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## Appendix B

### INFORMATION COLLECTION

*Title:* Complaints under 49 C.F.R. 1111

*OMB Control Number:* 2140-0029

*Form Number:* None

*Type of Review:* Revision of a currently approved collection<sup>12</sup>

*Summary:* As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3501-3521 (PRA), the Surface Transportation Board (Board) gives notice that it is requesting from the Office of Management and Budget (OMB) approval for the revision of the currently approved information collection, Complaints under 49 C.F.R. part 1111, OMB Control No. 2140-0029, as further described below. The requested revision to the currently approved collection is necessitated by this Notice of Proposed Rulemaking, which amends certain information collected by the Board in stand-alone cost (SAC) rate cases. All other information collected by the Board in the currently approved collection is without change from its approval.

*Respondents:* Affected shippers, railroads, and communities that seek redress for alleged violations related to unreasonable rates, unreasonable practices, service issues, and other statutory claims.

*Number of Respondents:* Four

*Frequency of Response:* On occasion. In recent years, respondents have filed approximately four complaints of this type per year with the Board.

*Total Burden Hours* (annually including all respondents): 1,876 (estimated hours per complaint (469) x total number of complaints (4)).

*Total Annual "Non-Hour Burden" Cost:* \$5,848 (estimated non-hour burden cost per complaint (\$1,462) x total number of complaints (4)).

*Needs and Uses:* Under the Board's regulations, persons may file complaints before the Board pursuant to 49 C.F.R. part 1111 seeking redress for alleged violations of provisions of the Interstate Commerce Act, Public Law 104-88, 109 Stat. 803 (1995). In the last few years, the most significant complaints filed at the Board allege that railroads are charging unreasonable

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<sup>12</sup> The Surface Transportation Board filed a 60-day notice of intent to seek extension of approval on November 29, 2016. See 81 Fed. Reg. 86,061.

rates or that they are engaging in unreasonable practices. See, e.g., 49 U.S.C. §§ 10701, 10704, and 11701. The collection by the Board of these complaints, and the agency's action in conducting proceedings and ruling on the complaints, enables the Board to meet its statutory duty to regulate the rail industry.